Supreme Court, U.S.
FILED
MAR 23 1998
CLERK

No. 97-1364

In The

Supreme Court of the United States

October Term, 1997

ROBERT S. SPRINGSTON,

Petitioner,

v.

CONSOLIDATED RAIL CORPORATION

and

GENERAL MOTORS CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT GENERAL MOTORS CORPORATION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ECKERT SEAMANS CHERIN
& MELLOTT, LLC
THOMAS J. SWEENEY*
JOSEPH M. RAMIREZ
600 Grant Street, 42nd Floor
Pittsburgh, PA 15219
Telephone: (412) 566-6000

Attorneys for Respondent
General Motors Corporation
**Counsel of Record*

March 23, 1998

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

STATEMENT OF INTERESTED PARTIES

The petitioner is Robert S. Springston, the plaintiff in the district court and the appellant before the court of appeals. The respondents are Consolidated Rail Corporation and General Motors Corporation, defendants in the district court and appellees before the court of appeals.

Pursuant to Supreme Court Rule 29.6, respondent General Motors Corporation states that it does not have a parent company. Its nonwholly owned subsidiaries are as follows:

Asset Leasing GmbH
Carus Grundstucks-Vermietungsgesellschaft mbH & Co.
General Motors GmbH & Co. OHG
Opel-Automobilwerk Eisenach-PKW Gmbh
Auto Cable Industries (Pty) Limited
Convesco Vehicle Sales GmbH
Contro Toonico Herramental, S.A. de C.V.
Packard Electric Hebi Co., Limited
Packard Electric Bai Cheng Co., Limited
Delphi Italia Automotive Systems S.r.l.
Delphi Italia Service Center S.r.l.
DRB s.a./n.v.
Opel France S.A.
ENCI S.A.R.L.
Texton P.L.C.
Delphi Harrison
Delphi L'EM Argentina S.A.
Reinshagen Tournai S.A.
GM Ovonic L.L.C.
Banque Opel
General Acceptance (Thailand) Ltd.
Holden National Leasing Limited
GM Finance HB

STATEMENT OF INTERESTED PARTIES – Continued

OPEL Leasinggesellschaft mbH
Polbank, S.A.
P.T. GMAC Lippo Finance
General Motors de Argentina S.A.
Beijing Wanyuan GM Automotive Electronic Control Co., Ltd.
Hubei Delphi Automotive Generator Co., Ltd.
Saginaw Norinco Lingyun Drive Shaft Co., Ltd.
Zhejiang Delphi Asia-Pacific Brake Co. Ltd.
General Motors Colmotores, S.A.
IBC Vehicles Limited
Millbrook Pension Management Ltd.
DIRECTTV Enterprises, Inc.
IBC Vehicles (Distribution) Limited
GM-Saab Communication GmbH
Packard CTA Pty. Ltd.
Packard Electric Systems Samara Cable Company
PanAmSat Corporation
PT General Motors Buana Indonesia
P.T. Packard Kabelindo Murni Indonesia
Radiodores Richard, S.A.

TABLE OF CONTENTS

Page

STATEMENT OF INTERESTED PARTIES i

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

REASONS FOR DENYING THE PETITION 4

I. THE LAW HAS BEEN SETTLED FOR 70 YEARS THAT BIA PREEMPTS CLAIMS LIKE THESE ... 4

A. *Napier's* Rule: BIA Preempts All State Law Respecting Locomotive Design Or Equipment, Including Conspicuity Equipment ... 5

B. There Is No Conflict With Respect To *Napier's* Application Here 13

II. THE ALTERNATIVE GROUND: FRSA PREEMPTION 16

A. FRSA's Express Preemption Of Common-Law Claims Where An FRA Regulation Is In Effect On The Same Subject Matter 17

B. The FRA Regulations For Audible And Visual Warning Equipment At The Time Of Petitioner's Accident 18

C. The FRA Regulations Preempt Petitioner's Proposed Common Law Requirements For Audible Warning And Light Equipment ... 19

D. The Exception To FRSA Preemption Does Not Apply 23

III. THE QUESTION PRESENTED ARISES RARELY AND IS NOT IMPORTANT 25

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Baltimore & Ohio R.R. v. Groeger, 266 U.S. 521 (1925) 7

Burlington Northern R.R. v. State of Montana, 805 F. Supp. 1522 (D. Mont. 1992) 10

Burlington Northern, Inc. v. Henry, 457 U.S. 1101 (1982) 14

Carter v. Consolidated Rail Corp., 1998 Ohio App. Lexis 514 (Feb. 10, 1998) 11, 13, 16

Central R.R. of Georgia v. Markert, 410 S.E.2d 437 (Ga. App. 1991) 11, 13, 23

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) 5

Consolidated Rail Corp. v. Penn. Pub. Util. Comm'n, 536 F. Supp. 653 (E.D. Pa. 1982), *aff'd*, 696 F.2d 981 (3d Cir. 1983), *aff'd*, 461 U.S. 912 (1983) (mem.) 22

Consolidated Rail Corp. v. Penn. Pub. Util. Comm'n, 461 U.S. 912 (1983) (mem.), *aff'g* 696 F.2d 981 (3d Cir. 1982), *aff'g* 536 F. Supp. 653 (E.D. Pa. 1982) ...4, 9

CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993) *passim*

CXST, Inc. v. Pitz, 699 F. Supp. 127 (W.D. Mich. 1988) 10

DeElena v. Southern Pacific Co., 592 P.2d 759 (Ariz. 1979) 15

Edwards v. Consolidated Rail Corp., 567 F. Supp. 1087 (D.D.C. 1983), *aff'd*, 773 F.2d 966 (D.C. Cir.), *cert. denied*, 469 U.S. 883 (1984) 14

TABLE OF AUTHORITIES – Continued

Page

Eldridge v. Missouri Pacific R.R., 832 F. Supp. 328 (E.D. Okla. 1993) 11, 13, 23

Henry v. District Court, 645 P.2d 1350 (Mont. 1982), *appeal dismissed*, 457 U.S. 1101 (1982) 13, 14

Hicks v. Miranda, 422 U.S. 332 (1975) 5

Hogue v. Southern Pacific Co., 460 P.2d 965 (Cal. 1969) 15

In re Miamisburg Train Derailment Litigation, 626 N.E.2d 85 (Ohio), *cert. denied*, 513 U.S. 809 (1994) 15, 16

In re Train Collision at Gary, Indiana, 670 N.E.2d 902 (Ind. App. 1996) 10

Keene Corp. v. United States, 508 U.S. 200 (1993) 10

Law v. General Motors Corp., 114 F.3d 908 (9th Cir. 1997) 8, 9

Lorillard v. Pons, 434 U.S. 575 (1978) 10

Marshall v. Burlington Northern, Inc., 720 F.2d 1149 (9th Cir. 1983) 10, 11, 13, 23

Michigan Canners & Freezers Assoc. v. Agricultural Mktg. & Bargaining Bd., 467 U.S. 461 (1984) 5

Missouri Pacific R.R. v. R.R. Comm'n, 833 F.2d 570 (5th Cir. 1987), *cert. denied*, 488 U.S. 1009 (1989) 9

Missouri Pacific R.R. v. R.R. Comm'n of Texas, 671 F. Supp. 466 (W.D. Tex. 1987) 10

Napier v. Atlantic Coast Line R.R., 272 U.S. 605 (1926) ..... *passim*

Penn. R.R. v. Pub. Serv. Comm'n, 250 U.S. 566 (1919) 6

TABLE OF AUTHORITIES – Continued

Page

Rucker v. Norfolk & W. Ry., 396 N.E.2d 534 (Ill. 1979) 15

Rucker v. Norfolk & Western Railway, 381 N.E.2d 715 (Ill. App. 1978), *rev'd*, 396 N.E.2d 534 (Ill. 1979) 15

Runkle v. Burlington Northern, Inc., 613 P.2d 982 (Mont. 1980) 14, 15

Smith v. Norfolk & W. Ry., 776 F. Supp. 1335 (N.D. Ind. 1991) 11, 23

Southern Ry. v. Lunsford, 297 U.S. 398 (1936) 4

Swift & Co. v. Wickham, 230 F. Supp. 398 (S.D.N.Y. 1964), *aff'd*, 364 F.2d 241 (2d Cir. 1966), *cert. denied*, 385 U.S. 1036 (1967) 25

Union Pacific R.R. v. Pub. Util. Comm'n, 723 F. Supp. 526 (D. Ore. 1989) 24

United Transp. Union v. Long Island R.R., 455 U.S. 678 (1982) 6

STATUTES

49 U.S.C. § 20106 ..... 3, 17, 24

49 U.S.C. § 20143(d) 22

49 U.S.C. §§ 20101 *et seq.* 1, 6, 17

49 U.S.C. §§ 20301 *et seq.* ..... *passim*

Department of Transportation Act, Pub. L. 89-670, 80 Stat. 931 (1966) 8

Revision of Title 49, Transportation, United States Code, Pub. L. 103-272, 108 Stat. 745 (1994) 7

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Display of Alerting Lights by Locomotives at Public Rail-Highway Crossings, 47 Fed. Reg. 44791 (Oct. 12, 1982) 19, 22, 23

Display of Alerting Lights by Locomotives at Public Rail-Highway Crossings; Termination of Rulemaking, 48 Fed. Reg. 20257 (May 5, 1983) 19

H.R. Rep. No. 103-108 (1994), *reprinted in* 1994 U.S.C.C.A.N. 818 6

H.R. Rep. No. 91-1194 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104 24

Proposed Requirement for Display of Alerting Lights by Locomotives at Public Grade Crossings, 44 Fed. Reg. 34982 (June 18, 1979) 19, 22

Proposed Requirement for Display of Alerting Lights by Locomotives at Public Grade Crossings, 47 Fed. Reg. 16189 (Apr. 15, 1982)..... 19

S. Rep. No. 68-740 (1924) 11

Strobe Lights on Locomotives, 43 Fed. Reg. 9324 (March 7, 1978)..... 22

REGULATIONS

49 C.F.R. § 1.49..... 8

49 C.F.R. § 229.129 .....11, 18, 23

49 C.F.R. § 229.133 11

49 C.F.R. § 229.125 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. art. VI, cl. 2 5

STATEMENT OF THE CASE

Just before midnight, petitioner Robert Springston drove across railroad tracks in rural Ohio. He was looking at a map on the seat next to him, not at the tracks, and a train was coming. The locomotive's 200,000-candela headlight beam was intense enough to illuminate a person nearly three football fields away. The engineer sounded its 96-decibel horn. Petitioner did not notice the train, and sustained serious injuries when it struck his pickup.

The locomotive complied with all federal regulations specifying the nature and performance of devices to warn of the train's approach – the headlight, horn, and bell. However, petitioner claims that under Ohio law General Motors (which designed and built the locomotive) and Conrail (which operated it) were negligent in not installing additional warning – so-called "conspicuity" – equipment such as oscillating lights.

GM moved for summary judgment, and Conrail for partial summary judgment, on the grounds that the claim concerning locomotive equipment was preempted by both (1) the Locomotive Boiler Inspection Act ("BIA"), 49 U.S.C. §§ 20301-20306, 20701-20903, which under *Napier v. Atlantic Coast Line Railroad*, 272 U.S. 605 (1926), preempts the field of locomotive design, construction and equipment; and (2) the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. §§ 20101-20144, which under *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), preempts state requirements (including common-law requirements) when a federal standard "cover[s] the subject matter of the State requirement."

The district court granted the motion. It held that *Napier* was dispositive and BIA thus preempted petitioner's claim. (Pet. App. C 13-24)[1] The Court of Appeals for the Sixth Circuit affirmed, also holding that BIA preempted the claim under *Napier*. (App. A 4-9) Having found *Napier* and BIA dispositive, neither the district court nor the Sixth Circuit reached the issue of preemption by FRSA. The court denied petitioner's petition for rehearing and suggestion for rehearing en banc. (App. B)

SUMMARY OF ARGUMENT

There is no issue to review. For 70 years this Court has held that BIA occupies the field and preempts all state law respecting "the design, the construction and the material of every part of the locomotive and of all appurtenances." *Napier v. Atlantic Coast R.R.*, 272 U.S. 605, 611 (1926). Thus *Napier* and a long line of lower court cases have held that BIA preempts all state law within the scope of the Federal Railroad Administration's ("FRA's") authority – that is, all state law respecting locomotive design and equipment. Petitioner's claim here – directed

[1] It also granted summary judgment to Conrail on petitioner's punitive damages claim, which is not at issue here. (*See* App. A 9-10) The case proceeded to trial against Conrail on a claim of inadequate warning devices at the crossing. The jury apportioned 70% negligence to petitioner and 30% to Conrail. (App. A 4) The judgment against Conrail was affirmed below and the adequacy of the warning at the crossing is not at issue here.

at locomotive design features – falls squarely in the occupied field, and so, the Court of Appeals held, is preempted under *Napier*. The petition does not cite, much less challenge, *Napier* or its controlling force here.

Petitioner imagines a conflict on the issue, but there is none. Petitioner cites no case that questions BIA field preemption or *Napier*, or that holds that conspicuity-equipment claims are outside the preempted field defined by *Napier*. A lone Montana decision declined, 16 years ago, to find preemption of a conspicuity-equipment claim, but it overlooked *Napier* altogether. No other decision has followed it on the point since. An old case, decided without consideration of this Court's controlling precedent, which has never been followed, does not warrant review of a settled issue. As to petitioner's other "conflicting" cases, they do not address BIA preemption at all, much less *Napier* or conspicuity equipment claims.

Even if there were not field preemption under BIA and *Napier*, the decision below still would be correct, for FRSA provides an alternative ground requiring preemption. The Court recently held in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 664 (1993), that FRSA expressly preempts state law (including state common law) relating to railroad safety where there is a federal regulation "covering the subject matter of the State requirement." 49 U.S.C. § 20106. Here, carefully considered FRA regulations cover locomotive lights and horns, and so cover the subjects of – and therefore, under FRSA and *CSX*, preempt – petitioner's claims.

Finally, even if there were some question about the law, there is no reason to address it here. Conspicuity-

equipment claims arise rarely, and so there is no conflict with respect to them. Moreover, this case is a uniquely poor vehicle to address any conspicuity-equipment issue: since the case was decided, new conspicuity-equipment regulations have gone into force, making any disposition here essentially irrelevant to future cases.

The decision below was correct, in fact compelled by settled Supreme Court precedent. There is no significant conflict. The petition should be denied.

REASONS FOR DENYING THE PETITION

I. THE LAW HAS BEEN SETTLED FOR 70 YEARS THAT BIA PREEMPTS CLAIMS LIKE THESE.

In 1926, Justice Brandeis wrote in *Napier* that BIA grants the federal government exclusive authority over "the design, the construction and the material of every part of the locomotive and of all appurtenances," including "equipment." *Napier v. Atlantic Coast R.R.*, 272 U.S 605, 611-612 (1926). BIA, *Napier* expressly held, "was intended to occupy the field" and precluded all state law within the matters committed to the ICC. 272 U.S. at 613. *Napier* has been repeatedly followed. *See Southern Ry. v. Lunsford*, 297 U.S. 398, 402 (1936) ("whatever in fact is an integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order of the Interstate Commerce Commission, are within" the BIA's scope); pp. 5-13, below. In fact, the Court affirmed in 1983 a decision finding preemption by BIA and FRSA. *Consolidated Rail Corp. v. Penn. Pub. Util.*

Comm'n, 461 U.S. 912 (1983) (mem.), *aff'g* 696 F.2d 981 (3d Cir. 1982), *aff'g* 536 F. Supp. 653, 655 (E.D. Pa. 1982) (BIA "preempts state regulation of locomotive equipment").[2]

The Court of Appeals did nothing wrong or radical here; it simply applied *Napier* according to its terms, and barred common-law claims that would impose under Ohio law requirements respecting locomotive designs or equipment to increase conspicuity. Petitioner does not even cite *Napier*, although it was the foundation of the Court of Appeals' decision. And petitioner does not urge that *Napier* should be overruled. Thus, there is nothing to review.

A. *Napier*'s Rule: BIA Preempts All State Law Respecting Locomotive Design Or Equipment, Including Conspicuity Equipment.

Article VI of the Constitution provides that federal law "shall be the supreme Law of the Land: . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Federal law preempts state law where federal law occupies the field, state law conflicts with federal law, or federal law expressly preempts state law. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). "The states must leave all regulatory activity" in an occupied field "to the Federal Government." *Michigan Canners & Freezers Assoc. v. Agricultural Mktg. & Bargaining Bd.*, 467 U.S. 461, 469 (1984).

---

[2] The only question decided by the lower court in that case was preemption. This Court's summary affirmance has precedential force. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

"When the United States has exercised its exclusive powers over interstate commerce [to occupy the field], the States no more can supplement its requirements than they can annul them." *Penn. R.R. v. Pub. Serv. Comm'n*, 250 U.S. 566, 569 (1919) (state law requiring caboose pre-empted where federal law silent on subject).

Railroads have been "subject to comprehensive federal regulation for nearly a century." *United Transp. Union v. Long Island R.R.*, 455 U.S. 678, 687 (1982). National regulation of railroad safety, particularly locomotive safety, stretches back at least to 1893. In that year, Congress enacted the first of a series of laws known as the Safety Appliance Acts and BIA,[3] now codified at 49 U.S.C. §§ 20301-20306; 20701-20903 (1994).[4] BIA regulates

---

[3] The Safety Appliance Acts were: Mar. 2, 1893, c.196, 27 Stat. 531 (currently codified in parts of 49 U.S.C. §§ 20301, 20302, 20304, 21302, 21304); Mar. 2, 1903, c. 976, 32 Stat. 943 (see 49 U.S.C. §§ 20301, 20302, 20303, 20304, 21302); and April 14, 1910, c. 160, 36 Stat. 298 (see 49 U.S.C. §§ 501, 20102, 20302, 20303, 21302, 21304).

The Boiler Inspection Acts were: Feb. 17, 1911, c. 103, 36 Stat. 913 (currently codified in parts of 49 U.S.C. §§ 20102, 20701, 20702, 20703, 21302, 21304); Mar. 4, 1915, c. 169, 38 Stat. 1192 (see 49 U.S.C. §§ 20701, 20702, 20703, 21302); June 26, 1918, c. 105, 40 Stat. 616 (repealed); June 7, 1924, c. 355, 43 Stat. 659 (see 49 U.S.C. §§ 20102, 20701); and April 22, 1940, c. 124, 54 Stat. 148 (see 49 U.S.C. §§ 20701, 20702, 20703, 21302).

[4] Congress recently recodified all "laws related to transportation in one comprehensive title" resulting in certain minor changes in language to promote clarity and consistency. H.R. Rep. No. 103-108 (1994), *reprinted in* 1994 U.S.C.C.A.N. 818, 820. However, "[i]n making changes in the language, precautions have been taken against making substantive changes in the law." *Id. See* Revision of Title 49, Transportation,

the condition, safety and testing of every "locomotive or tender and its parts and appurtenances." 49 U.S.C. § 20701.

Uniformity of locomotive regulation is essential. As the Court stated in *Baltimore & Ohio R.R. v. Groeger*, 266 U.S. 521 (1925), supplemental locomotive equipment claims cannot be left to the "varying and uncertain opinions and verdicts of juries":

> There is a multitude of mechanical questions involved in determining the proper construction, maintenance and use of the boilers, other parts of locomotives, their tenders and appurtenances, all of which are covered by the Boiler Inspection Act, as amended. Inventions are occurring frequently and there are many devices to accomplish the same purpose. Comparative merits as to safety or utility are most difficult to determine. ***It is not for the courts to lay down rules which will operate to restrict the carriers in their choice of mechanical means by which their locomotives, boilers, engine renders and appurtenances are to be kept in proper condition. Nor are such matters to be left to the varying and uncertain opinions and verdicts of juries.***

Id. at 529-30 (citations omitted) (emphasis added). Indeed, state and local locomotive requirements would require train changes at state or even county lines, which would paralyze the railroad industry:

United States Code, Pub. L. 103-272, §§ 1(a), 6(a), 108 Stat. 745, 1378 (1994) (act restated existing law "without substantive change").

> If each state were to adopt different liability-triggering standards, manufacturers would have to sell locomotives and cars whose equipment could be changed as they crossed state lines, or adhere to the standard set by the most stringent state. Either way, Congress's goal of uniform, federal railroad regulation would be undermined.

Law v. General Motors Corp., 114 F.3d 908, 910-11 (9th Cir. 1997).

Accordingly, BIA grants the Interstate Commerce Commission authority over "the design, the construction and the material of every part of the locomotive and of all appurtenances," including "equipment." *Napier*, 272 U.S at 611-12.[5] BIA "was intended to occupy the field," and preempts all state law within the matters committed to the ICC (and today, the FRA). 272 U.S. at 606, 613.

That is true regardless whether the state law conflicts with any federal rule, whether there is any applicable federal rule at all, and whether the state law has the same or a different purpose as BIA:

> ***It is also urged that, even if the Commission has power to prescribe*** an automatic firebox door and a cab curtain, ***it has not done so; and that it has made no other requirement inconsistent***

---

[5] In 1966, the power originally granted to the ICC was transferred to the Secretary of Transportation. Department of Transportation Act, Pub. L. 89-670, 80 Stat. 931 (1966). The FRA, a division of the Department of Transportation, exercises the power. 49 C.F.R. § 1.49(c)(5), (g).

> ***with the state legislation. This, if true, is without legal significance.*** The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power. We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to ***occupy the field***. . . . [R]equirements by the States are precluded, however commendable ***or however different their purpose***.

272 U.S. at 613 (emphasis added). In sum, "if the protection now afforded by the Commission's [now FRA's] rules is deemed inadequate, application for relief must be made to it." *Id.*

Petitioner does not question *Napier*, and it remains established law. *See Consolidated Rail Corp. v. Penn. Pub. Util. Comm'n*, 461 U.S. 912 (1983) (mem.), *aff'g* 696 F.2d 981 (3d Cir. 1982), *aff'g* 536 F. Supp. 653, 655 (E.D. Pa. 1982) (summarily affirming decision that BIA and FRSA preempted state law requiring speed recorders and indicators; BIA "preempts state regulation of locomotive equipment"). The lower courts have accordingly applied it to preclude state by state regulation of locomotive equipment, just as Congress intended. *See, e.g., Law v. General Motors Corp.*, 114 F.3d 908 (9th Cir. 1997) (BIA preempts negligent-design claim for failure to include equipment on locomotives; "Congress intended federal law to occupy the field of locomotive equipment and safety"); *Missouri Pacific R.R. v. R.R. Comm'n*, 833 F.2d 570, 576 n.7 (5th Cir. 1987) (BIA preempts state law requiring telemetry devices on locomotives; "State attempts to prescribe *any* locomotive safety equipment

must necessarily fail") (emphasis in original), *cert. denied*, 488 U.S. 1009 (1989); *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1151-52 (9th Cir. 1983) (Kennedy, J.).[6]

Petitioner suggests that Congress repealed BIA. (Pet. 15) Not so. To the contrary, Congress re-enacted and recodified BIA in 1994, and moved it from Title 45 to Title 49 of the United States Code. (P. 6, n.4 above) Congress' recodification of BIA, without substantive change (*id.*), after the long line of decisions finding field preemption, affirms that Congress' preemptive intent was properly gauged by *Napier* and its progeny. *See Keene Corp. v. United States*, 508 U.S. 200, 212 (1993) (re-enactment of statute implicitly adopts settled judicial construction); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (same).

Napier and progeny dictate that BIA preempts petitioner's claim. The preempted field under *Napier* – "the design, the construction and the material of every part of the locomotive and of all appurtenances," including locomotive "equipment," 272 U.S at 611-12 – includes design features and equipment respecting conspicuity. Indeed, regulations under BIA show that the FRA has authority

---

[6] Federal district courts and state intermediate appellate courts agree that BIA preempts state law respecting locomotive equipment. *E.g., Burlington Northern R.R. v. State of Montana*, 805 F. Supp. 1522, 1529 (D. Mont. 1992) ("Telemetry devices are unquestionably within the Secretary's power to regulate. . . . Therefore, any state regulation of such devices is absolutely preempted"); *Missouri Pacific R.R. v. R.R. Comm'n of Texas*, 671 F. Supp. 466 (W.D. Tex. 1987) (radios); *CXST, Inc. v. Pitz*, 699 F. Supp. 127, 129 (W.D. Mich. 1988) (commodes); *In re Train Collision at Gary, Indiana*, 670 N.E.2d 902 (Ind. App. 1996) (unspecified common-law design-defect claim).

over the subject of petitioner's complaint, and has exercised it; FRA regulations specifically govern visual and audible warning devices. *See* 49 C.F.R. § 229.125 (headlamp and, effective December 1997, auxiliary warning devices); 49 C.F.R. § 229.133 (transitional regulation of auxiliary warning lights); 49 C.F.R. § 229.129 (audible warning device); pp. 18-19, below.

Established law thus dictated the result the Sixth Circuit reached in this conspicuity-equipment case, and a long line of authority agrees. *Marshall,* 720 F.2d at 1151-52 (BIA preempts a claim alleging need for same conspicuity equipment allegedly needed here); *Eldridge v. Missouri Pacific R.R.,* 832 F. Supp. 328, 330 (E.D. Okla. 1993) (BIA preempts "state law with respect to allegations concerning the adequacy of the locomotive warning devices"); *Smith v. Norfolk & W. Ry.,* 776 F. Supp. 1335, 1342-43 (N.D. Ind. 1991) (FRSA "preempts the claim that the train's headlight was inadequate"); *Central R.R. of Georgia v. Markert,* 410 S.E.2d 437, 438 (Ga. App. 1991) (BIA preempts claim that "failure to have equipped the locomotive with certain safety and warning devices was actionable negligence"); *Carter v. Consolidated Rail Corp.,* 1998 Ohio App. Lexis 514 (Feb. 10, 1998) (same).

Petitioner proposes that BIA was meant only to protect railroad employees, and theorizes that bystanders' claims thus are not preempted. (Pet. 15) That thesis is wrong, from premise to conclusion, and no court has adopted it. As to the premise, Congress intended BIA to protect both employees and the traveling public. BIA was formally entitled "An Act to Promote the Safety of Employees and Travelers Upon Railroads. . . . " 36 Stat. 913 (1911); *see* S. Rep. No. 68-740, at 1-2 (1924) ("The

locomotive boiler inspection law was enacted in 1911 for the purpose of protecting the safety of employees and travelers upon railroads. . . . ").

As to the conclusion, *Napier* itself rejected the argument that state law survives preemption if its purpose differs from the federal statute's. Indeed, one of the state regulations there challenged served the same purpose that petitioner would have Ohio law effect here: "to protect travelers upon the highways crossed by the railroad at grade." 272 U.S. at 609-10. The states in *Napier* argued primarily that BIA preempted only laws with the same purpose as the federal statute:

> The argument mainly urged by the States in support of the claim that Congress has not occupied the entire field, is that the federal and state laws are aimed at distinct and different evils; that the federal regulation endeavors solely to prevent accidental injury in the operation of trains, whereas the state regulation endeavors to prevent sickness and disease due to excessive and unnecessary exposure; and that whether Congress has entered a field must be determined by the object sought through the legislation, rather than the physical elements affected by it.

Napier, 272 U.S. at 612. The Court found the purpose of the state regulation irrelevant. The dispositive point was that "[t]he federal and state statutes are directed to the same subject – the equipment of locomotives. They operate upon the same object." *Id.* If states require additional or non-uniform locomotive safety equipment for any reason, interstate commerce is impaired in the same way.

This case proves the point. Petitioner's bystander claim would, if allowed, impose state equipment requirements on locomotives which FRA rejected, and which come within the authority of the Secretary of Transportation, not states, to prescribe. Accordingly, that claim would affect the "physical elements" of locomotive equipment, and so "would operate upon the same object" – locomotive equipment – as it would if brought by railroad employees. *Napier*, 272 U.S. at 612. Therefore, it would likewise result in a patchwork of state regulation – the opposite of the uniform regulation Congress intended. Consequently, it is likewise preempted, and without exception, every reported case on point so holds. *Marshall*, 720 F.2d at 1152 (relying on *Napier* to find bystander tort suit preempted by BIA); *Eldridge*, 832 F. Supp. at 330 (same); *Markert*, 410 S.E.2d at 438 (same); *Carter*, 1998 Ohio App. Lexis 514 (same). Indeed, this Court has expressly held bystander claims preempted by FRSA. *CSX*, 507 U.S. at 673-76.

Napier is good law, and it applies here squarely. There is nothing to review.

B. There Is No Conflict With Respect To *Napier*'s Application Here.

Petitioner conjures a conflict between the Court of Appeals' decision and a decision from the early 1980s that rejected preemption of a conspicuity-equipment claim. *See Henry v. District Court*, 645 P.2d 1350 (Mont. 1982), *appeal dismissed*, 457 U.S. 1101 (1982) (cited in Pet. 12). But *Henry* did not cite, much less address, *Napier* and

its finding of BIA field preemption.[7] A decision that does not analyze the controlling Act, overlooks the controlling Supreme Court precedent, and has never been followed on the point by any reported decision since,[8] is hardly a source of conflict or trouble. Indeed, petitioner did not even cite *Henry* below.

Petitioner then tallies up five other decisions supposedly showing states' resistance to preemption on other subjects. In truth, none of those cases is even relevant, much less in conflict with the decision below. For example, *Runkle v. Burlington Northern, Inc.*, 613 P.2d 982 (Mont. 1980) (cited in Pet. 11), focuses on the adequacy under state law of warning signs and gates at grade crossings, and on train speed. But those are matters outside BIA's field; BIA's field is locomotive equipment, not grade crossings or train speed. Indeed, the grade-crossing issues in this case were not held preempted, but went to

---

[7] Plaintiff in *Henry* alleged that a railroad was negligent under state law in not equipping its locomotive with an oscillating headlight and strobe light. 645 P.2d at 1350. Although the defendant argued preemption by both FRSA and BIA, the court discussed preemption only under FRSA and did not discuss BIA, much less cite *Napier*. 645 P.2d at 1351, 1352. This Court lacked jurisdiction to correct the error. *Burlington Northern, Inc. v. Henry*, 457 U.S. 1101 (1982) (dismissing appeal).

[8] One district court has cited *Henry* in holding that FRSA preempts only when there is a federal regulation on point. *Edwards v. Consolidated Rail Corp.*, 567 F. Supp. 1087, 1101 (D.D.C. 1983), *aff'd*, 773 F.2d 966 (D.C. Cir.), *cert. denied*, 469 U.S. 883 (1984). That is true under FRSA. *CSX*, 507 U.S. at 664-65. BIA, by contrast, occupies the field and was not at issue in *Edwards*.

the jury.[9] *Runkle* briefly discusses the railroad's state-law duties concerning locomotive conspicuity, but never mentions federal preemption, BIA, or *Napier*.

Two other cases address solely state substantive law and have nothing to do with BIA or preemption. *Hogue v. Southern Pacific Co.*, 460 P.2d 965 (Cal. 1969); *DeElena v. Southern Pacific Co.*, 592 P.2d 759, 762 (Ariz. 1979) (cited in Pet. 19-20). Like *Runkle*, *Hogue* concerned state law standards for grade crossings, not locomotives; therefore had nothing to do with BIA; moreover predated FRSA and *CSX;* and did not address preemption at all. *DeElena* likewise concerned state law standards of care, and said nothing about BIA or preemption or federal law.

Petitioner's last two cases, *Rucker v. Norfolk & Western Railway*, 381 N.E.2d 715 (Ill. App. 1978), *rev'd*, 396 N.E.2d 534 (Ill. 1979), and *In re Miamisburg Train Derailment Litigation*, 626 N.E.2d 85 (Ohio), *cert. denied*, 513 U.S. 809 (1994), are likewise off point. Both concerned exploding tank cars, not locomotives. Not surprisingly, neither mentioned, much less addressed, the issues here: BIA and its preemption of the field of locomotive design and equipment, including locomotive conspicuity equipment. *Rucker* also is dead wrong. Both the Illinois Court of Appeals and Illinois Supreme Court held in *Rucker* that FRSA does not preempt state tort requirements more stringent than federal regulations. 381 N.E.2d at 722-23; *Rucker v. Norfolk & W. Ry.*, 396 N.E.2d 534, 537 (Ill. 1979). That is the proposition for which petitioner cites it. (Pet.

---

[9] In any event, this Court has since laid down the preemption rules as to claims concerning grade crossings. *CSX*, 507 U.S. at 673-75.

21-22). This Court has since held the contrary. *CSX*, 507 U.S. at 673-75 (FRSA preempts state tort law, including tort law that would impose duties more stringent than federal regulations). Pp. 14-15, below. As for *Miamisburg*, it held that FRSA did not preempt a particular claim where there was no federal regulation covering the subject matter. 626 N.E.2d at 95. That is way off point, since (1) the issue under *Napier* and BIA is field preemption; and (2) as to FRSA preemption, here we have federal regulations that cover visual and audible warning devices.[10] (Pp. 16-23, below)

To end where we began, *Napier* holds that BIA preempts all state law concerning locomotive design and equipment. The Sixth Circuit simply followed *Napier*. Petitioner cites no case from any court that questions *Napier*'s controlling force over claims like petitioner's, or its dictate of preemption. There is nothing to review.

II. THE ALTERNATIVE GROUND: FRSA PREEMPTION.

The Court of Appeals found that BIA preempted petitioner's claim. It thus had no occasion to address the other basis for preemption – FRSA. This Court has recently addressed FRSA preemption, in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993). *CSX* would compel a finding of preemption even if *Napier* did not.

---

[10] Indeed, the Ohio Court of Appeals agrees that *Miamisburg* is off point and that BIA preempts locomotive conspicuity-equipment claims. *See Carter v. Consolidated Rail Corp.*, 1998 Ohio App. Lexis 514 (Feb. 10, 1998).

Thus, even if the Court were to review the decision, overrule *Napier* after 70 years of precedent, and so reverse the decision below, the Sixth Circuit on remand would have to address – and find – preemption by FRSA. Thus, review of BIA preemption decision here would not resolve the case or allow it to go to trial in any event.

A. FRSA's Express Preemption Of Common-Law Claims Where An FRA Regulation Is In Effect On The Same Subject Matter.

In 1970, Congress enacted FRSA, 49 U.S.C. §§ 20101-20144 (1994). FRSA is not limited to locomotives, but authorizes the Secretary of Transportation (through FRA) to issue regulations in the area of railroad safety generally. FRSA reiterates Congress' determination that railroad safety be regulated nationally: "[l]aws, regulations, and orders related to railroad safety shall be *nationally uniform* to the extent practicable." 49 U.S.C. § 20106 (emphasis added).

FRSA accordingly expressly preempts every state "law, regulation, or order," including "legal duties imposed . . . by the common law," relating to railroad safety where a federal regulation "cover[s] the subject matter of the State requirement." 49 U.S.C. § 20106; *CSX*, 507 U.S. at 664. A federal regulation thus preempts state law if it "substantially subsumes" the subject matter regulated. *CSX*, 507 U.S. at 664.

B. The FRA Regulations For Audible And Visual Warning Equipment At The Time Of Petitioner's Accident.

Even before petitioner's accident, the FRA specified what audible warning equipment and lights locomotives must carry. Equipment on the lead locomotive must "produce[ ] a minimum sound level of 96 db(A)." 49 C.F.R. § 229.129(a). This intensity must be achieved at "100 feet forward of the locomotive in its direction of travel." 49 C.F.R. § 229.129(a). The performance must be measured using a meter conforming to the ANSI Sl.4-1971, Type 2, set to an A-weighted slow response. 49 C.F.R. § 229.129(b). At the time of the test, the locomotive must be on level tangent track and the microphone must be exactly 4 feet above the ground and centered on the track. 49 C.F.R. § 229.129(b). Measurement tolerance is ±4 db(A). 49 C.F.R. § 229.129(c).

The FRA likewise specified, at the time of petitioner's accident, the kind and intensity of locomotive visual warning equipment. The lead locomotive must carry headlights that produce "at least 200,000 candela." 49 C.F.R. § 229.125(a). There must be two lights, one facing front and one rear, if the locomotive is regularly run backwards. 49 C.F.R. § 229.125(a). The lights must have a dimming device. 49 C.F.R. § 229.125(c). The lights must be arranged to "illuminate a person at least 800 feet ahead". 49 C.F.R. § 229.125(a).[11]

---

[11] For years before petitioner's accident, the FRA considered and rejected additional lighting devices as unnecessary or counterproductive. *See* Proposed Requirement for Display of Alerting Lights by Locomotives at Public Grade

Affidavits of Conrail's general foreman of locomotives and its locomotive inspector established without dispute that the locomotive here, inspected just ten days before petitioner's accident, complied with the FRA regulations on audible warning and light equipment.

C. The FRA Regulations Preempt Petitioner's Proposed Common Law Requirements For Audible Warning And Light Equipment.

CSX teaches that once the FRA has decided the appropriate safety measures for a particular hazard, it has covered the subject. No state can require additional

---

Crossings, 44 Fed. Reg. 34982 (June 18, 1979); Proposed Requirement for Display of Alerting Lights by Locomotives at Public Grade Crossings, 47 Fed. Reg. 16189 (Apr. 15, 1982) (proposed rules received extensive criticism and the agency withdrew them); Display of Alerting Lights by Locomotives at Public Rail-Highway Crossings, 47 Fed. Reg. 44791, 44795 (Oct. 12, 1982); Display of Alerting Lights by Locomotives at Public Rail-Highway Crossings; Termination of Rulemaking, 48 Fed. Reg. 20257, 20258 (May 5, 1983) (FRA terminated previous rulemaking because "Substantial questions [had been] raised about the effectiveness of the strobe light (and alerting lights generally), the costs involved, and the operational reliability of the strobe devices"; FRA then initiated new rulemaking, determined that auxiliary lights ought not be required, and terminated the second rulemaking. "There is no evidence that alerting lights are effective in reducing grade crossing accidents"; "[T]he group of equipped railroads . . . had a slightly *higher* grade-crossing accident rate. . . . [A]lerting lights have no discernible effect on the incidence of grade crossing accidents.") (emphasis added).

or different measures to address that same hazard, whether by statute, regulation or common-law claims that would impose state requirements. In *CSX*, for example, petitioner sought to impose a common-law duty to operate a train at a lower speed than the federal speed limit set by the FRA. The Court rejected the argument that states could impose stricter limitations than the federal speed limit. It held that states cannot supplement federal regulations or reweigh risks that the Federal Railroad Administration has already taken into account:

> On their face, the provisions of § 213.9(a) address only the maximum speeds at which trains are permitted to travel. . . . Nevertheless, related safety regulations adopted by the Secretary reveal that ***the limits were adopted only after the hazards posed by track conditions were taken into account.*** Understood in the context of the overall structure of the regulations, the speed limits must be read as not only establishing a ceiling, but also ***precluding additional state regulation*** of the sort which respondent seeks to impose on petitioner. . . . ¶ [T]he limits in § 213.9(a) were set with safety concerns already in mind. . . . ¶ Read against this background, § 213.9(a) should be understood as covering the subject matter of train speed with respect to track conditions, including the conditions posed by grade crossings.

507 U.S. at 674-75 (emphasis added).

In *CSX*, the federal regulations also specified the type of warning device to be installed at a grade crossing, and the method by which the device was to be selected. This Court held that a claim based on inadequacy of the warning device would accordingly be preempted. "[T]he

Secretary has determined the devices to be installed. . . ." 507 U.S. at 671. The regulations "therefore cover the subject matter of state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and repair dangerous crossings." *Id.*[12] Thus, under *CSX*, where the FRA has specified the devices to be installed, the states may not impose additional regulations.

CSX controls this case. As in *CSX*, federal regulations cover the subject here. The complaint alleges that the locomotive was defective under Ohio law because it did not "adequately audibly or visually warn[ ]" of the train's approach. (Complaint ¶¶ 22, 48) But federal regulations specify the exact audible and visual warning equipment required on locomotives, including the equipment's power, performance and orientation. Pp. 18-19, above. The regulations are directed at precisely the same purpose as petitioner's tort claim: ensuring that people outside the locomotive, and in particular motorists at grade crossings, will know a train is coming.

Horns are there to warn bystanders of an approaching train. So are headlights. The FRA's rulemaking has made clear that headlights are conspicuity devices, and that FRA determines whether additional lights also are required. For example, the FRA's 1979 notice of proposed

---

[12] The particular plaintiff's claim in *CSX* was not preempted because federal funding of the intersection project, a prerequisite to application of the particular regulation at issue, was not present. *Id.* at 671-73. There is no such funding prerequisite in the FRA regulations about lights and audible warnings.

rulemaking for auxiliary warning lights listed three existing conspicuity devices: headlights, whistles and bells. Proposed Requirement for Display of Alerting Lights by Locomotives at Public Grade Crossings, 44 Fed. Reg. 34982, 34983 (June 18, 1979). The agency's 1982 proposal to require alerting lights reiterated that "current FRA regulations require a headlight that produces at least 200,000 candela for each lead locomotive [and an audible warning device]. *These devices provide significant audible and visual alerting characteristics.*" The proposed rule thus described auxiliary warning lights as a "complement" to the headlight. Display of Alerting Lights by Locomotives at Public Rail-Highway Crossings, 47 Fed. Reg. 44791, 44792 (Oct. 12, 1982) (emphasis added).[13]

In fact, at 200,000 candela, 49 C.F.R. § 229.125(a), the headlight is as bright as or brighter than *all* of the auxiliary warning lights that the FRA considered and rejected

---

[13] Likewise, the agency's first advance notice of proposed rulemaking for auxiliary warning lights stated that oscillating lights might be used "to provide an *increased degree of visual conspicuity over and above that of a stationary white headlight* for vehicular traffic at grade crossings; it *supplements the standard fixed beam headlight*. . . . " Strobe Lights on Locomotives, 43 Fed. Reg. 9324, 9325 (March 7, 1978) (emphasis added). And the 1997 requirement to carry warning headlights is part of the headlight regulation; the FRA obviously considers warning lights and headlights the same "subject matter." *Cf. Consolidated Rail Corp. v. Penn. Pub. Util. Comm'n*, 536 F. Supp. 653, 657-58 (E.D. Pa. 1982) (by discussing related devices together in advance notice of proposed rulemaking, FRA indicated they were part of same subject matter for preemption purposes), *aff'd*, 696 F.2d 981 (3d Cir. 1982), *aff'd*, 461 U.S. 912 (1983) (mem.). *See also* 49 U.S.C. § 20143(d)(1) (FRA to review "locomotive headlight standards" as part of effort to improve locomotive conspicuity).

before petitioner's accident, or that it required beginning in 1997. *See, e.g.*, "Display of Alerting Lights by Locomotives at Public Rail-Highway Crossings", 47 Fed. Reg. 44791, 44795 (October 12, 1982) (proposing auxiliary lights between 400 and 200,000 candela); 49 C.F.R. § 229.125(d)(2) (newly required auxiliary headlights to be at least 200,000 candela); pp. 18-23, nn.11 and 13 above. A beam powerful enough to illuminate a person 800 feet away, 49 C.F.R. § 229.125(a), can be seen from farther away still.

In short, headlights and horns warn that a train is coming, and so are conspicuity devices as a matter of law and common sense. Petitioner's claim is expressly preempted, because the FRA regulations "cover[ ] the subject of the state requirement." Put another way, petitioner's claim fails because the railroad "complied as a matter of law with its duty to provide locomotive warning devices when it met the requirements of 49 C.F.R. §§ 229.125 [headlight], 229.129 [horn]. . . . " *Marshall*, 720 F.2d at 1153; *see also Eldridge*, 832 F. Supp. at 330 (citing *Marshall*); *Smith*, 776 F. Supp. at 1342-43; *Markert*, 410 S.E.2d at 438 (quoting *Marshall*). There are no contrary cases since *CSX*.

D. The Exception To FRSA Preemption Does Not Apply

Congress provided a narrow set of circumstances in which FRSA would not preempt state regulations on a subject covered by federal regulations. To avoid preemption, state laws or regulations must (1) be "necessary to eliminate or reduce an essentially local safety hazard;" (2) not be "incompatible" with federal law or regulations;

and (3) "not unreasonably burden interstate commerce." 49 U.S.C. § 20106. Petitioner's claim must pass all three tests, but fails all three.

As to test (1), locomotive conspicuity is not an "essentially local" safety concern. Visibility of trains approaching grade-crossings is not a matter unique to Ohio, much less to the crossing where petitioner was injured. Moreover, the state doctrines on which petitioner relies – negligence, strict liability and warranty (Complaint at 3-13) – do not deal with local hazards; like the negligence claim preempted in *CSX*, they provide "general rule[s] to address all hazards caused by lack of due care, not just those owing to unique local conditions." *CSX*, 507 U.S. at 675. Holding general state rules to be directed at local hazards "would completely deprive the Secretary of the power to pre-empt state common law, a power clearly conferred by § 434 [now § 20106]." *Id.; see* H.R. Rep. No. 91-1194 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4117 (local hazards are not "Statewide in character"). Locomotive visibility can be and is dealt with through uniform national standards with respect to conspicuity devices. *See Union Pacific R.R. v Pub. Util. Comm'n*, 723 F. Supp. 526, 530 (D. Ore. 1989) (essentially local safety hazard must be "not statewide in character," and "not capable of being adequately encompassed in uniform national standards").

As to test (2), petitioner not only seeks to impose different duties upon defendants from those imposed by BIA and FRSA, they seek to impose rules on defendants that the FRA had rejected at the time of petitioner's accident. Thus petitioner's proposed rules are contrary to federal law, and so incompatible with it.

As to test (3), Congress intended that locomotive safety equipment standards be uniform and consistent. For, as Judge Friendly observed, permitting different state standards would have a "paralyzing effect on railroads from prescription by each state of the safety devices obligatory on locomotives that would pass through many of them." *Swift & Co. v. Wickham*, 230 F. Supp. 398, 407-08 (S.D.N.Y. 1964), *aff'd*, 364 F.2d 241 (2d Cir. 1966), *cert. denied*, 385 U.S. 1036 (1967). Claims such as petitioner's could require a train to be designed one way to go into one state, and another way to go into another. That would obviously put extreme burdens on interstate commerce, and present the archetypal case federal law was meant to preempt.

In sum, the preemption decision below is right, not only under *Napier* and BIA, but also under *CSX* and FRSA. There is no reason to review it.

III. THE QUESTION PRESENTED ARISES RARELY AND IS NOT IMPORTANT.

The Court has addressed both BIA and FRSA preemption, in the case of FRSA just a few years ago. There is no need to revisit either issue, especially since the preemption issue arises rarely. BIA preemption has come up infrequently in the 70 years since *Napier*, and has engendered no controversy when it has. And *CSX* laid the FRSA matter to rest; few cases since *CSX* even address the issue. Conspicuity-equipment preemption cases are particularly rare; the parties cite only seven cases, including the decision below, that have addressed preemption of such claims, and those decisions (putting

aside the Montana case that overlooks *Napier*) are unanimous.

Recent regulatory developments also dictate that, as a practical matter, a decision in this case will not inform future cases. If there were any doubt that federal regulations could or did cover the subject of locomotive conspicuity equipment – and so preempted claims addressed to that issue – the FRA dispelled it in 1996. It ruled that effective December 31, 1997, locomotives must carry two 200,000-candela auxiliary lights, arranged in a specified manner to form a triangle with the headlight. 49 C.F.R. § 229.125(d) The obvious purpose is to provide for conspicuity.

That decision, issued after years of examining the costs and benefits of conspicuity devices,[14] expressly takes into account the hazard of low visibility and attempts to avert it, and so covers the subject matter. *CSX*, 507 U.S. at 673-75. Thus, even if this case, which arose before the 1996 regulations took effect, somehow should have avoided BIA or FRSA preemption, a decision here would have no effect on future conspicuity-equipment cases. Those cases would have to be decided with reference to the new regulations. The new regulations also dispose of the (imaginary) specter, raised in the petition, of rampant railroad accidents if review is denied. (Pet. 24-25) The new FRA regulations do away with any urgency, if there ever were any to begin with.

---

[14] *See* pp. 18-23 and nn. 11 and 13 above.

Finally, petitioner prevailed against Conrail below on a theory that the crossing (as opposed to the locomotive) did not have adequate conspicuity devices. (App. A 4) His damages and his own comparative fault (paying no attention and reading a map on the railroad tracks) are the same regardless of what conspicuity theory he pursues. Thus, even if the partial summary judgment as to an alternative liability theory were in error, the petitioner has little to complain about. In that setting, review would seem unnecessary, even if there were somehow an issue to review.

CONCLUSION

The petition for a writ of certiorari should be denied.

DATED: March 23, 1998.

ECKERT SEAMANS CHERIN
& MELLOTT, LLC
THOMAS J. SWEENEY*
JOSEPH M. RAMIREZ
600 Grant Street, 42nd Floor
Pittsburgh, PA 15219
Telephone: (412) 566-6000

Attorneys for Respondent
General Motors Corporation
**Counsel of Record*